Supreme Court, U.S.
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No. 92-1607

In The

Supreme Court of the United States

October Term, 1992

GENERAL MOTORS CORPORATION,

Petitioner,

v.

JOANN DRENNAN, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the District Court and the Court of Appeals correctly hold that General Motors breached its fiduciary duties in violation of ERISA when the evidence demonstrated that General Motors misled the Plaintiffs by representing that an employee benefit plan known as VTEP would never be offered to the laid off employees of the Norwood, Ohio GM plant at a time when General Motors had VTEP under serious consideration for such employees?

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STATEMENT OF FACTS

1. The Decision to Close the Norwood GM Plant

In November, 1986, Herbert D. Stone attended a meeting in Warren, Michigan to discuss the prospect of plant closings within GM's Chevrolet-Pontiac-GM of Canada Group. ("CPC Group") (R.115: Stone at TR Day 3, p. 67). GM's Norwood plant was one of 27 plants within the CPC Group. (R.113: Andrew at TR Day 1, p. 38). Stone was Plant Manager of the Norwood Plant. (R.115: Stone at TR Day 3, p. 66). At that meeting, GM announced that it had decided to close the Norwood Plant. (R.115: Stone

at TR Day 3, p. 68). GM ordered Stone to inform the Norwood employees of that decision. (R.115: Stone at TR Day 3, p. 68).

As a result, Stone announced to each of the two shifts on November 16, 1986 that the Norwood plant would close. (Stone Depo., p. 18). Later, GM announced that the Norwood plant would cease production on August 26, 1987. (R.115: Stone at TR Day 3, p. 68). In order to prepare for the plant closing, Stone was directed to explore the various benefits that were available and to explain those benefits to the Norwood employees. (R.115: Stone at TR Day 3, p. 68).

There are two employee benefit plans relevant to the case at bar: the Supplemental Unemployment Benefit Plan ("SUB Plan") and the Voluntary Termination of Employment Program ("VTEP"). Plaintiffs alleged that they were misled by GM into believing that VTEP would never be offered and, therefore, accepted a buyout of their benefits under the SUB Plan ("SUB buyout"), under which they received significantly less valuable benefits. The District Court found from the evidence that that is exactly what happened in the case at bar. (R.71: Findings of Fact, Opinion, and Conclusions of Law, p. 16). The Court of Appeals affirmed.

2. Explanation of the Relevant Benefit Plans

Under the existing SUB Plan, eligible employees were entitled to receive a supplement to their state unemployment pay. SUB plan payments were paid on a weekly basis for a limited period of weeks. (R.70: Appendix E,

Joint Ex.II-5; R.71: Findings of Fact, Opinion, and Conclusions of Law, Finding of Fact No. 4, p. 3). The SUB Plan is based on a limited funding arrangement, under which weekly SUB benefits are paid from a trust fund. (R.113: Bennett at TR Day 3, p. 94). The amount of money paid into the SUB fund is based on the number of hours worked during a week. (*Id.*). Thus, if GM reduces its production or implements a layoff, the amount contributed to the SUB fund is reduced. (R.113: Bennett at TR Day 3, p. 95).

Reduced contribution to the SUB fund directly translates into reduced weekly payments to the employee. (R.113: Bennett at TR Day 3, p. 104). An employee's weekly SUB payment is based on the employee's credit units and the credit unit cancellation rate. (R.113: Bennett at TR Day 3, pp. 101-104). As SUB fund assets decline, the credit unit cancellation rate increases. (*Id.*). This results in the laid-off employee's receipt of a smaller weekly payment. Once the employee's credit units have been exhausted, he can no longer receive SUB payments. (R.115: Bennett at TR Day 3, p. 101).

After exhaustion of SUB Plan's weekly payments, an employee with ten or more years of seniority becomes eligible for GIS. (R.70: Appendix E, Joint Ex. II-45; R.71: Findings of fact, Opinion, and Conclusion of Law, Finding of Fact No. 4, p. 4-5). GIS, like SUB Plan, offered weekly payments to eligible employees, (R.15: Bennett at TR Day 3, p. 110). Continued receipt of GIS was, however, contingent upon numerous requirements. For example, an employee would lose his entitlement to GIS if he refused a job offer at any GM plant, no matter how distant. (R.115: Bennett at TR Day 3, p. 127; R.71: Findings

of Fact, Opinion, and Conclusions of Law, Finding of Fact No. 5, pp. 4-5).

Because of the diminishing value of the weekly SUB payments and the uncertain availability of GIS, many employees inquired about the possibility of a lump sum buyout of their benefits. The SUB Plan provided for a lump sum payment to employees in exchange for which the employees terminated their employment with GM. (R.70: Amended Appendix G, Defendant's Ex. G-2, pp. 56, 67). Normally, an employee had to be on layoff for 12 months to receive this SUB buyout. (*Id.*). GM, however, agreed to waive this waiting period for layoffs resulting from the plant closing in September, 1987 and allowed for a buyout of one's SUB Plan benefits. (R.113: Andrew at TR Day 1, p. 82).

Many employees asked GM representatives about the availability of another lump sum buyout known as VTEP. (R.113: Andrew at TR Day 1, p. 53). VTEP also requires that an employee terminate employment with GM in exchange for the lump sum payment. (*Id.*). Eligible employees could receive VTEP benefits from GM, ranging from $35,000.00 to $55,000.00, depending upon the employee's seniority. (R.70: Amended Appendix G, Defendant's Ex. G-1, p. 204). VTEP, thus, offered more money to laid-off employees than did the SUB buyout. Although employees of GM's Norwood plant were not contractually entitled to receive VTEP (R.113: Andrew at TR Day 1, p. 105), GM management seriously considered an offer of VTEP to Norwood employees, and eventually offered VTEP, but misled the employees into believing that VTEP would never be made available. (R.71: Findings of Fact, Opinion, and Conclusions of Law, pp. 15-16).

3. GM Begins Serious Consideration of VTEP

As the District Court found, serious consideration of an offer of VTEP began long before the SUB buyout was offered in September, 1987. (R.71: Findings of Fact, Opinion, and Conclusions of Law, p. 15). Between November, 1986, when the plant closing was announced, and March, 1987, plant manager, Herbert Stone, had discussions with Dick Huber, CPC Personnel Director, and Kenneth Gallinger, CPC Director of Industrial Relations-Plants, pertaining to employee benefits. (Stone Depo., pp. 24-25). During this same time period, Stone had discussions with his staff at the Norwood plant, particularly John Maisch, plant Personnel Director, and Tom Clarke, plant General Supervisor of Personnel. (R.113: Maisch at TR Day 1, p. 109; R.113: Clarke at TR Day 1, p. 153). Stone requested Maisch and Clarke to pursue the availability of VTEP for Norwood employees. (R.113: Maisch at TR Day 1, pp. 109-110; R.113: Clarke at TR Day 1, p. 154). He also specifically discussed VTEP with Dave Campbell, Vice President of Manufacturing for CPC Group. (R.115: Stone at TR Day 3, p. 80). Maisch and Clarke decided that Clarke should pursue VTEP with CPC headquarters. (R.113: Clarke at TR Day 1, p. 154).

Clarke contacted CPC headquarters in an effort to ascertain what needed to be done to obtain VTEP for the Norwood employees. (R.113: Clarke at TR Day 1, p. 154). In April or May, 1987, he contacted Rodney Andrew, Director of Industrial Relations for GM's CPC Group, (R.113: Clarke at TR Day 1, p. 155; R.113: Andrew at TR Day 1, p. 37), in an attempt to obtain VTEP for the

Norwood employees. (R.113: Clarke at TR Day 1, p. 115). Andrew expressed concern with the large number of employees to be placed on layoff and the fact that many of them would be GIS-eligible. (R.113: Andrew at TR Day 1, p. 50). Thus, he had been searching for alternatives as to how GM could deal with the large number of employees to be laid off. (R.113: Andrew at TR Day 1, p. 51). Andrew had looked at VTEP, believing that it might present GM with an opportunity to better handle the large number of layoffs resulting from the closure of the Norwood plant. (R.113: Andrew at TR Day 1, p. 52). Andrew, therefore, agreed with Norwood management's requested attempt to make VTEP available to the Norwood employees. (R.113: Andrew at TR Day 1, p. 54).

On June 23, 1987, Andrew sent a memorandum to Richard F. O'Brien, GM's General Director of Industrial Relations, urging GM to make VTEP available to Norwood employees. (R.113: Andrew at TR Day 1, pp. 57-58, Joint Ex. XIX; R.116: O'Brien at TR Day 4, p. 75). GM's Industrial Relations Staff, which O'Brien directed, was responsible for dealing with all GM hourly employees. (O'Brien, Depo., p. 13). O'Brien reviewed Andrew's memorandum and also directed Richard Fleming to review it. (O'Brien Depo. pp. 19-20). Fleming was Assistant Director of Labor Relations, Industrial Relations Staff, with responsibility for the Norwood plant. (*Id.*). Shortly after receiving this memorandum, O'Brien informed Andrew that GM was not willing to offer VTEP for Norwood. (R.113: Andrew at TR Day 1, p. 62; R.71: Findings of Fact, Opinion, and Conclusions of Law, Finding of Fact No. 7, p. 6). Andrew communicated O'Brien's decision to Norwood management. (R.113: Andrew at TR Day 1, p. 63).

Despite O'Brien's action, efforts to obtain VTEP continued throughout the summer of 1987. (R.71: Findings of Fact, Opinion, and Conclusions of Law, Finding of Fact No. 8, p. 6). Stone continually contacted Andrew to inquire as to the status of VTEP. (R.113: Andrew at TR Day 1, pp. 66-68). As O'Brien testified, Stone would not take no for an answer. (O'Brien Depo., p. 27). Andrew also persisted in his efforts. He pressed the VTEP issue with O'Brien and David Campbell, CPC's Vice-President of Operations, whenever he had the opportunity to speak with them. (R.113: Andrew at TR Day 1, pp. 39, 66-68). He even took up the issue with O'Brien's superior, Alfred Warren, Vice-President, Industrial Relations Staff, on two or three occasions. (R.113: Andrew at TR Day 1, p. 77; O'Brien Depo., p. 12).

O'Brien agreed to take another look at the issue of VTEP for Norwood employees. (O'Brien Depo., p. 29). O'Brien requested GM's Treasury Office in New York to provide him with a financial analysis of VTEP versus a SUB buyout. (*Id.*). The Treasurer's report was completed and sent to O'Brien on or about August 18, 1987. (O'Brien Depo., p. 31). This report concluded that a SUB buyout was as financially attractive to employees desirous of separating from GM as VTEP and that an offer of VTEP would not result in any significant long-term savings to GM. (Joint Ex. XXIX). Therefore, at a meeting on August 19, 1987, O'Brien again informed Andrew that GM was not interested in offering VTEP to Norwood employees. (R.113: Andrew at TR Day 1, pp. 66-70).

Andrew notified Stone and Clarke of the results of that meeting. (Stone Depo., p. 64). Stone and Clarke believed the Treasurer's report to be flawed in that it was

based on erroneous assumptions about the condition of the SUB fund and, therefore, reached an incorrect conclusion. (Stone Depo., pp. 57-59). Stone and Clarke continued throughout the Fall of 1987 to try to obtain VTEP for Norwood employees. Andrew also persisted in his efforts. (R.113: Andrew at TR Day 1, pp. 77-78). Despite these rejections, the issue of whether VTEP would be made available may have seemed dead in the water, but it never sunk. (R.113: Clarke at TR Day 1, pp. 168-169). As Clarke candidly admitted, the VTEP proposal for Norwood was always an issue. (*Id.*).

4. GM conducts a Series of Meetings to Explain Severance Benefits

Shortly after the Norwood plant closed, GM decided to offer SUB buyout to Norwood employees. (R.113: Maisch at TR Day 1, p. 146). Clarke sent a notice to all Norwood hourly employees on or about September 15, 1987, informing them that a series of meetings would be held during the week of September 21 through 25, 1987, to discuss the SUB buyout offer. (R.113: Clarke at TR Day 1, pp. 162-164; Joint Ex. IV). At the time of the meetings, GM projected that the SUB fund's condition would worsen, causing a diminution of the amount of weekly SUB payments. (R.113: Clarke at TR Day 1, p. 163).

Prior to these meetings, Gallinger instructed Maisch that if a question arose about VTEP, Norwood management would be out of line if they even suggested that VTEP was a possibility. (R.113: Maisch at TR Day 1, p. 118). As a result, neither Maisch nor anyone acting under his direction ever informed the hourly employees

that VTEP was still being pursued. (R.113: Maisch at TR Day 1, p. 130). This instruction was given and followed, despite the fact that the meetings' purpose was to inform employees of their options (R.113: Maisch at TR Day 1, p. 126) and that VTEP was still being requested. (R.113: Clarke at TR Day 1, pp. 168-169, 173).

At the meetings, GM emphasized that the SUB fund was dropping rapidly and that weekly SUB payments would soon be reduced. (R.114: Partin at TR Day 2, p. 88; R.114: Drennan at TR Day 2, p. 99). The employees were, thus, encouraged to take the SUB buyout. (R.114: Allen at TR Day 2, pp. 63-64; R.70: Findings of Fact, Opinion, and Conclusions of Law, Finding of Fact No. 6, pp. 5-6).

The members of the audience asked on several occasions whether VTEP would be made available. (R.223: Clarke at TR Day 1, pp. 167-168). GM responded that VTEP had been turned down and that it was "dead in the water." (*Id.*). GM repeatedly told the employees that the SUB buyout was the best buyout that would be offered and that nothing else would be made available. (R.114: Allen at TR Day 2, pp. 64, 70, 77; R.114: Partin at TR Day 2, pp. 88-89). Clarke, who was placed in charge of these meetings, specifically stated that GM would offer only the SUB buyout and that VTEP would not be made available. (R.114: Drennan at TR Day 2, pp. 99-102). From this evidence, the trial court concluded that GM misled these employees, (R.71: Findings of Fact, Opinion, and Conclusions of Law, p. 16).

5. GM Decides to Offer VTEP

After the September meetings and continuing into early 1988, Plaintiffs seriatim elected to accept the SUB buyout, thereby terminating their employment and seniority with GM. (*Id.*, Finding of Fact No. 10, p. 8; Joint Ex.I). All the while, however, GM, still had VTEP under serious consideration. (*Id.*, Finding of Fact No. 11, pp. 8-9).

In September or October, 1987, Maisch again approached Gallinger with the VTEP question. (R.113: Maisch at TR Day 1, p. 129). Stone instructed Maisch and Clarke to continue their pursuit of VTEP. (*Id*). After the September meetings, Clarke had additional discussions with CPC officials regarding a VTEP proposal for Norwood, (R.113: Clarke at TR Day 1, p. 168) and his notes of November 16, 1987 state that "[w]e in Norwood are currently in a holding pattern until we get further guidance on this." [VTEP]. (R.113: Clarke at TR Day 1, p. 173).

In mid-November, 1987, Gallinger instructed Paul Schnobrick to perform another analysis of whether VTEP should be offered at Norwood. (R.116: Gallinger at TR Day 4, p. 16). Schnobrick performed this cost analysis, concluding that it was to GM's financial advantage to offer VTEP to Norwood employees with ten or more years of seniority. (Schnobrick Depo., pp. 29-30; Joint Ex. XXX). In December, Rick Fleming of GM's Industrial Relations Staff responsible for CPC Group, contacted O'Brien about VTEP for Norwood and O'Brien authorized him to pursue it. (R.116: O'Brien at TR Day 4, pp. 76-80). By December 15, 1987, there was reason to believe that VTEP would be approved. (R.113: Clarke at

TR Day 1, p. 76; Plaintiffs' Ex.3). GM continued to take applications for the SUB buyout during this time (R.113: Clarke at TR Day 1, p. 174), but never disclosed that any activity pertaining to VTEP was being undertaken. (*Id.*). In fact, William Price, who assumed Clarke's responsibilities in February, 1988, testified that GM continued to accept SUB buyout applications during this time, but did not disclose that VTEP had been approved. (R.114: Price at TR Day 2, pp. 156-174). Indeed, he specifically told employees that VTEP would not be offered. (*Id.* at pp. 170-172). Finally, on April 12, 1988, GM and the UAW entered into a Memorandum of Understanding formalizing their agreement to make VTEP available to Norwood employees with ten or more years of seniority. (Joint Ex.XXXII).

GM did not permit Plaintiffs to participate in VTEP. Nor did GM permit Plaintiffs to participate in a second VTEP offering in June, 1988 to Norwood employees with 10 years of seniority, which is still open. (R.71: Findings of Fact, Opinion, and Conclusions of Law, Finding of Fact No. 15, p. 10; R.114: Price TR Day 2 at pp. 184-189.

SUMMARY OF ARGUMENT

Throughout its Petition for Certiorari, GM presents a number of irrelevant legal arguments in an effort to divert this Court's attention from the essential injustice which GM chose to inflict upon its employees. In its Petition, GM castigates the District Court for its statement that GM's conduct "simply was not fair." (petition, pp. 6-7). However, neither the District Court nor the

Court of Appeals grounded their decisions on vague notions of fairness as GM represents. Rather, the District Court held that GM, in the overall context of the plant closing, with its repeated representations that VTEP would never be offered and that the SUB fund was rapidly dwindling, misled Plaintiffs as to the availability of VTEP. As recognized by the District Court and the Court of Appeals, such misleading conduct is not only unfair, but is inconsistent with the duties imposed upon an ERISA fiduciary. Indeed, it is incongruous to argue that one can simultaneously mislead employees and satisfy ERISA's fiduciary duties, as GM suggests in this case.

GM's entire basis for seeking review in this Court is based upon a complete misstatement of the holdings of the District Court and the Court of Appeals. Among its findings, the District Court concluded that GM misled Plaintiffs by stating that VTEP was "dead in the water" and that the SUB buyout was the best buyout that would be offered. GM representatives specifically stated that VTEP would never be made available to Norwood employees. Despite these representations, GM Norwood plant management had previously begun efforts to obtain VTEP, which efforts the District Court deemed "serious consideration" within the moaning of *Berlin v. Michigan Bell Telephone Co.*, 858 F.2d 1154 (6th Cir. 1988). in *Berlin*, the Sixth Circuit Court of Appeals held that once an employer has a plan under serious consideration, the employer acts as a fiduciary when making representations about the future availability of that plan. Any misrepresentations made, either negligently or intentionally, constitute a breach of the fiduciary duties imposed by

ERISA, 29 U.S.C. §1104. Relying on *Berlin*, both the District Court and the Court of Appeals held that GM's conduct violated its duties as an ERISA fiduciary.

GM's contention that the District Court and the Court of Appeals imposed a duty of disclosure is simply not supported by the record in this case. The testimony offered at the District Court demonstrated that GM represented that VTEP would not be offered when, in fact, VTEP was under serious consideration by GM. For example, Joann Drennan testified as follows:

> Q: Now, going back to the first meeting, did Mr. Clarke say anything about VTEP?
>
> A: Only when asked questions about it.
>
> Q: What did he say when he was asked questions about it?
>
> A: Mr. Clarke said VTEP was not an option for us, and people continued asking questions about it.
>
> Q: About VTEP?
>
> A: Yes. And he got irritated, and he didn't want to answer no more questions. He just said it was not an option for us, that we would not get it.

(R.114: Drennan at TR Day 2, p. 100). Jerry Allen, another GM worker, also testified that, at the meetings, Norwood GM management was "asked directly by people in the crowd if at any time we would be offered VTEP buyout, and they told us absolutely not . . . " (R.114: Allen at TR Day 2, pp. 72-73). Herman Partin also testified that GM stated that the employees would never get VTEP. (R.114: Partin TR Day 2, p. 88).

Based on this, and other similar testimony, the District Court found that GM misled its employees. (R.71: Findings of Fact, Opinion and Conclusions of Law, p. 16).[1] Relying on *Berlin*, the District Court recognized that GM had a "duty not to make misrepresentations" (*Id.*, p. 15) and held that GM breached that duty. (*Id.*) The District Court concluded that GM's emphasis upon the poor condition of the SUB Fund and the poor prospects of finding work with GM, coupled with statements that VTEP would never be offered, created a sense of urgency to accept the SUB buyout and to do so quickly. GM's failure to accurately state the status of VTEP was, thus, materially misleading. GM, through its half truths and concealment of material facts, misled its employees.

Contrary to GM's assertions, the Court of Appeals did not impose a duty of disclosure. Indeed, the Court of Appeals' opinion emphasizes that GM was guilty of misrepresentations. The Sixth Circuit stated as follows:

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[1] GM's entire argument that the District Court imposed a duty to disclose is based on a portion of a sentence in the District Court's opinion. GM, however, conveniently omits the context in which that statement was made and the District Court's conclusion of that sentence. In full, that sentence states as follows: "Although GM did not make any truly false statements without the benefit of hindsight, GM did mislead its employees of the Norwood plant by not disclosing that a VTEP type plan would be offered or even that the local management was pursuing such a plan. In such a situation, where the livelihood of some twenty-nine hundred employees were at stake, GM should have at least mentioned the progress and the efforts of local management, instead of just presenting a grim outlook as to future benefits." (R.70: Findings of Fact, Opinion and Conclusions of Law, p. 16).

> GM's consideration of the class' participation in VTEP was initiated during November, 1986, when the plant closing was announced. Thereafter, during the ensuing months to April 12, 1988, when GM made a VTEP program available to GM employees with more than ten years of seniority upon application, GM management had, in fact, been seriously considering this ultimate action without disclosing the internal progress of those considerations to the class. To the contrary, throughout this entire period GM was instructing its management personnel to convey negative impressions to the class indicating that VTEP would not be available for their participation and that the program was "dead in the water" as far as Norwood laid off employees were concerned.
>
> As a result of GM's misrepresentations during the period between September, 1987 and February, 1988, the class elected to accept the SUB buyout. . . . 977 F.2d at 249 (Emphasis Added).[2]

Thus, GM's entire basis for seeking certiorari is based upon a misstatement of the case. GM claims that this Court must review the decision of the Court of Appeals because the Sixth Circuit, unlike any other appellate court, has imposed a duty of disclosure upon an ERISA

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[2] GM's misrepresentations were emphasized by the Court of Appeals throughout its opinion. For example, the Court of Appeals stated that "[a]lthough the Norwood plant management consistently denied that VTEP would become available to them, GM management was, in fact, privately considering the option of their participation in VTEP. Relying upon management's statements, the class accepted the SUB buyout." 977 F.2d at 248.

fiduciary. Having begun from the erroneous premise that the Sixth Circuit imposed a duty of disclosure, it is not surprising to find GM arrive at the equally erroneous conclusion that certiorari must be granted. Nonetheless, despite GM's protestations to the contrary, the Sixth Circuit, as set forth previously, did not impose a duty of disclosure. Contrary to GM's statements, neither the District Court nor the Court of Appeals ruled that GM violated ERISA because it failed to advise Plaintiffs that a VTEP might some day be negotiated at Norwood. Plaintiffs have never asked any court for the imposition of any such duty. Had GM said nothing about VTEP, no liability could be imposed for ERISA imposes no obligation to disclose that a particular benefit might be offered. Had GM accurately stated the status of VTEP, GM could incur no liability because ERISA surely does not penalize an employer for being truthful.[3] Nonetheless, GM chose to discuss repeatedly VTEP. GM chose to state that VTEP would never be made available. By so choosing, GM misled Plaintiffs, inducing them to accept a less lucrative severance package. The District Court and the unanimous Court of Appeals rightly held that GM's conduct violated ERISA and GM must now bear the consequences of that conduct.

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[3] In this regard, GM also argues that if it had represented that VTEP was under consideration and then chosen not to offer VTEP, it would incur liability to those who delayed acceptance of the SUB buyout and thereby suffered a diminution of benefits. A fiduciary, however, does not breach its duties of loyalty, prudence, and acting for the employees' benefit by being honest. Indeed, ERISA is designed to protect employees from misleading conduct. It is doubtful that employees need such protection from the truth.

REASONS FOR DENYING THE PETITION

I. INTRODUCTION

All of GM's arguments as to the calamitous consequences that will ensue if the Court of Appeals' decision is upheld are based upon the assumption that the District Court and the Court of Appeals have imposed a duty of disclosure. As set forth previously, neither the District Court nor the Court of Appeals imposed a duty of disclosure. Consequently, GM has set forth no basis for review by this Court. In fact, the Court of Appeals specifically disclaimed any intention of creating a duty of disclosure, stating in its opinion that if a fiduciary chooses to respond to questions about an ERISA plan, it must provide complete and accurate responses and that such a duty "does not require the fiduciary to disclose its internal deliberations nor interfere with the substantive aspects of the bargaining process." 977 F.2d at 251. As GM's entire basis for seeking review by this Court is erroneous, this Court should deny the Petition for Certiorari.

Nor will the decision of the Court of Appeals adversely effect the collective bargaining process. GM claims that the Court of Appeals upset the delicate balance of power in collective bargaining by requiring disclosure of GM's internal deliberations. However, mandating that an employer be accurate and truthful if it chooses to disclose information will not plunge the collective bargaining system into chaos. GM's argument stems from its erroneous assumption that the Court of Appeals has required GM to disclose its internal deliberations as to bargaining strategy. Neither the District Court nor the Court of Appeals

imposed any such duty. The Court of Appeals noted that GM's misleading communications violated ERISA. 977 F.2d at 251. Both the District Court and the Court of Appeals merely held that because GM chose to discuss the availability of VTEP, it was not free to mislead its employees as to the status of VTEP. Both the District Court and the Court of Appeals recognized that GM was not required to disclose anything. Nonetheless, having chosen to disclose, GM was not free to mislead.

GM has, therefore, plainly overstated the importance of the Court of Appeals' decision. This decision will not have the broad consequences that GM claims. Rather, this decision is limited by the unique factual setting presented to the Court. This precise factual scenario is unlikely to be often repeated. Nonetheless, if this factual scenario is again presented, the Courts should follow this decision.[4] To rule otherwise would be to grant to an ERISA fiduciary, such as GM, a license to lie. GM's assertions as to the dire consequences that will ensue if the Court's decision is upheld have far more basis in rhetoric than in reality. GM has been required only to accurately convey the status of VTEP or to say nothing about VTEP. The Court of Appeals require no predictions; it merely required candor since GM had chosen to speak. The Court of Appeals' decision does not require an employer to disclose strategies as to employee benefit negotiations. GM's

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[4] GM also complains because, since the decision in this case, it has twice been sued for ERISA violations. Nonetheless, the solution to GM's predicament is quite simple: refuse to discuss ERISA benefit plans in the event of a plant closing or, in the alternative, tell the truth if it chooses to discuss ERISA benefit plans.

entire approach to this case stems from its premise that it did not mislead or misrepresent, a premise rejected by both the District Court and the Court of Appeals. The Court of Appeals simply held that because GM chose to communicate with Plaintiffs about VTEP, it had to honor, fully and completely, its fiduciary obligations and could not mislead Plaintiffs.[5]

II. NEITHER THE DISTRICT COURT NOR THE COURT OF APPEALS IMPOSED A DUTY OF DISCLOSURE

The very issue upon which GM seeks review is a complete mischaracterization of the decisions of the District Court and the Court of Appeals. The District Court closely examined the duties imposed on an ERISA fiduciary when dealing with plan participants. These duties are the duty of loyalty, the duty of acting as a prudent man, and the duty of acting for the exclusive benefit of plan participants. In that context, the District Court found that

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[5] GM's misleading conduct would clearly have been actionable at common law, either through a cause of action for fraud or promissory estoppel. These common law claims, however, are pre-empted by ERISA. 29 U.S.C. §1144. Thus, as this Court noted in a different context, adopting GM's reading of ERISA "would afford less protection to employees and their beneficiaries than they enjoyed before ERISA was enacted." *Firestone Tire and Rubber Company v. Bruch*, 489 U.S. 101, 109 S.Ct. 948, 956 (1989). Clearly, this would be a curious result to reach from a statute enacted "to promote the interest of employees and their beneficiaries in employee benefit plans." *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 90, 103 S.Ct. 2890, 2896 (1983).

GM represented that VTEP would never be made available. (R. 71: Findings of Fact, Opinion, and Conclusions of Law, Finding of Fact No. 10, stating: "[i]n the context of information from both GM and UAW that VTEP was not available, and that the SUB fund might be depleted, or that SUB certificates might be further devalued, members of the Plaintiffs' class elected a SUB buyout . . . "). The District Court also found that GM repeatedly stressed the deteriorating condition of the SUB fund. (*Id.*, Finding of Fact Nos. 6, 9 and 10). GM's failure to mention the efforts to obtain VTEP, coupled with the statements that VTEP would never be offered and the grim outlook provided as to the SUB fund, misled Plaintiffs into believing that VTEP would never be offered. Also, the District Court recognized that GM had a "duty not to make misrepresentations" (*Id.*, p. 15) and held that GM had breached that duty. (*Id.*).

Similarly, the Court of Appeals also recognized that GM misled the plaintiff class. The Court of Appeals stated in its opinion that throughout the period from November, 1986 through April, 1988, "GM was instructing its management personnel to convey negative impressions to the class indicating that VTEP would not be available for their participation and that the program was 'dead in the water' as far as laid-off Norwood employees were concerned." 977 F.2d at 249. The Court of Appeals further stated that "[a]s a result of GM's misrepresentations during the period between September, 1987 and February, 1988, the class elected to accept the SUB buyout. . . . " *Id.* (Emphasis Added). GM's misrepresentations were also emphasized by the Court of Appeals in its

statement that "[a]lthough the Norwood plant management consistently denied that VTEP would become available to them, GM management was, in fact, privately considering the option of their participation in VTEP." *Id.* The Court of Appeals further stated that "relying upon management's statements, the class accepted the SUB buyout." *Id.* (Emphasis Added). Clearly, therefore, neither the District Court nor the Court of Appeals imposed the unprecedented duty of disclosure that GM claims.

GM further argues that it was not acting as a fiduciary when it represented to Plaintiffs that VTEP would never be made available. 29 U.S.C. §1104 imposes fiduciary duties upon an employer which administers an ERISA plan. GM has admitted that it is the plan administrator/fiduciary for VTEP. The question is then whether GM acted in a fiduciary capacity when it communicated with its employees about the availability of VTEP. The Sixth Circuit, relying upon its prior opinion in *Berlin v. Michigan Bell Telephone Co.*, 858 F.2d 1154 (6th Cir. 1988), held that GM was acting as a fiduciary when it represented to Plaintiffs that VTEP would never be offered to Norwood employees. (R.113: Clarke at TR Day 1, pp. 167-168; R.114: Price TR Day 2, pp. 170-172; R.114: Allen TR Day 2, pp. 64, 70, 77; Partin at TR Day 2, pp. 88-89; Drennan at TR Day 2, pp. 99-102).[6] In *Berlin*,

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[6] GM attempted to distinguish *Berlin* in the Court of Appeals and to thereby argue at that level that, although GM may have misled its employees, as found by the District Court (R.71: Findings of Fact, Opinion, and Conclusions of Law, p. 16), that GM made no affirmative misrepresentations. Similarly, GM argues in its Petition that it made no affirmative misrepresentations. Thus, GM argues that ERISA allows it to mislead through

the Sixth Circuit noted that the decision to offer an ERISA plan was a non-fiduciary business decision. However, the Court in *Berlin*, and also in the case at bar, recognized that a distinction must be drawn between the actual corporate decision to offer benefits and the communications made by fiduciaries about the likelihood of the offering of the plan. The Court in *Berlin* held that "when serious consideration was given by MBT to implementing MIPP by making a second offering . . . then MBT as the plan administrator and/or plan fiduciary, had a fiduciary duty not to make misrepresentations, either negligently or intentionally to potential plan participants concerning the second offering." 858 F.2d at 1163-64.

Under *Berlin*, an employer acts as a fiduciary when it makes representations about the future offering of an ERISA plan and must, therefore, comply with the fiduciary duties imposed by 29 U.S.C. §1104. As in *Berlin*, GM sponsored a severance package, VTEP. As in *Berlin*, GM's

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half truths and concealment of material facts, so long as no affirmative misrepresentations are made. Although the evidence in this case demonstrated that GM did, in fact, make affirmative misrepresentations, the Sixth Circuit in *Berlin* ruled that misleading statements may be made either intentionally or negligently, and that either could operate to create in the mind of the listener an inaccurate understanding of the facts. The law has long recognized that one can mislead another through partial revelations of fact. *See, e.g., Walter v. Marion Production Credit Association*, 42 Ohio App.3d 215, 537 N.E.2d 676 (1987). Neither the District Court nor the Court of Appeals, however, imposed a duty of disclosure. The District Court and the Court of Appeals merely held that because GM chose to discuss VTEP, it was prohibited from doing so in a misleading manner.

decision to offer VTEP was a non-fiduciary business decision. As in *Berlin*, the argument that the decision to offer the plan was a non-fiduciary business decision misses the point. Plaintiffs do not challenge GM's right to offer VTEP. Like the plaintiffs in *Berlin*, Plaintiffs in the case at bar were not contractually entitled to VTEP. GM remained free to offer or not offer VTEP. (R.71: Findings of Fact, Opinion, and Conclusions of Law, p. 12). However, having chosen to offer VTEP and having chosen to communicate with Plaintiffs as to the availability of VTEP, GM assumed the role of an ERISA fiduciary and was required to comply with the duties imposed by 29 U.S.C. §1104.

The evidence at trial established that GM repeatedly communicated to Plaintiffs that the Norwood plant did not qualify for VTEP, and that VTEP would never be made available to the Norwood employees. At the meetings held during the week of September 21 through 25, 1987, GM told employees that the condition of the SUB fund would worsen, causing a reduction of weekly SUB payments. (R.113: Clarke at TR Day 1, p. 163). Kenneth Gallinger instructed Norwood management that they would be out of line if they even suggested that VTEP was a possibility. (R.113: Maisch at TR Day 1, p. 118). Norwood management followed this instruction, representing that VTEP was "dead in the water," and that the SUB buyout was the only buyout that would ever be offered. (R.113: Clarke at TR Day 1, pp. 167-168). When asked, GM representatives specifically stated that VTEP would never be made available. (R.114: Drennan at TR Day 2, pp. 99-102; R.114; Allen at TR Day 2, pp. 64, 70, 77; R.114: Partin at TR Day 2, pp. 88-89; R.113: Clarke at TR

Day 2, pp. 88-89; R.114: Price at TR Day 2, pp. 170-172). GM, thus, encouraged the employees to take the SUB buyout. (R.114: Allen at TR Day 2, pp. 63-64; R.71: Findings of Fact, Opinion, and Conclusions of Law, Finding of Fact No. 6, pp. 5-6).

III. THE SIXTH CIRCUIT HAS NOT REQUIRED GM TO DISCLOSE ITS INTERNAL DELIBERATIONS AS TO COLLECTIVE BARGAINING NEGOTIATIONS

GM next claims that ERISA's fiduciary standards do not apply because it was undertaking "internal deliberations" about whether to offer VTEP. Plaintiffs, however, do not challenge GM's internal deliberations. Plaintiffs could not have been misled by what GM did internally. GM misled Plaintiffs by making public representations that VTEP would never be made available. (R.114: Drennan at TR Day 2, pp. 99-102; R.114: Clarke at TR Day 2, pp. 88-89). Because VTEP was under serious consideration, GM was governed by ERISA's fiduciary standards when making its representations about a future offering of VTEP.[7] Because GM chose to mislead Plaintiffs through

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[7] To support its argument that ERISA's fiduciary duties are inconsistent with the role of an employer in a collective bargaining situation, GM blatantly misrepresents the holding of *United Independent Flight Officers, Inc. v. United Airlines, Inc.*, 756 F.2d 1274, 1280 (7th Cir. 1985). In that case, the Court merely held that an employer did not act as a fiduciary while negotiating an agreement, because of the obviously conflicting roles of fiduciary and negotiator. Where, as here, however, representations are made about the potential offering of an ERISA plan, ERISA's fiduciary duties do apply. *See, Berlin v. Michigan Bell Telephone Company*, Supra.

its statements and conduct, GM breached it fiduciary duties under *Berlin*.[8]

In short, GM acted as a fiduciary when it made representations concerning the availability of VTEP. The District Court and the Court of Appeals simply held that since GM chose to disclose information about VTEP, it could not, through half truths, partial disclosure, and concealment of facts, mislead its employees. As recognized by the Sixth Circuit in *Berlin*, and in the case at bar, such conduct violates 29 U.S.C. §1104.

IV. THE SIXTH CIRCUIT'S DECISION DOES NOT CONFLICT WITH THE DECISIONS OF OTHER COURTS OF APPEALS

The Court of Appeals' decision herein is not inconsistent with the decision of other Courts of Appeals. The decisions cited by GM are simply inapplicable, given the unique facts of this case. Due to GM's misrepresentations, its reliance on *Payonk v. HMW Industries, Inc.*, 883 F.2d 221 (3d Cir. 1989), is misplaced. In *Payonk*, the Plaintiffs never alleged that their employer misled them in any way. Rather, the employer said nothing. Absent any misrepresentations, liability under 29 U.S.C. §1104 could not attach for there is no duty to disclose. 883 F.2d at 226. In

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[8] GM also argues that it can not be deemed a fiduciary because it could have utilized a third party administrator, and, had it done so, it would have not known the status of VTEP. This is patent nonsense. GM did not use an outside administrator. It did know the status of VTEP. GM chose to make misrepresentations about VTEP. Thus, what GM could have done can not allow it to escape responsibility for what it actually did.

Berlin, and in the case at bar, the employer chose to communicate about the potential offering of the plan and, in so communicating, misled its employees. Thus, cases such as *Payonk*, which recite the general rule there is no duty to disclose potential changes in a plan, are of no consequence. Nor is the decision in *Barnes v. Lacy*, 927 F.2d 539 (11th Cir. 1991) inconsistent with the Sixth Circuit's holding in *Drennan*. In *Barnes*, unlike *Drennan*, the District Court found, as a fact, that the employer had no plans to offer the more lucrative benefit plan at the time of the plant closing. 927 F.2d at 541. In fact, the plan was not under consideration at the time of the plant closing, as it was a onetime offer. *Id.* The Court in *Barnes* emphasized that "[i]n its findings of fact, the trial court determined that plaintiffs had failed to show that Alagasco either contemplated or intended to offer a voluntary retirement plan subsequent to VERO." *Id.* The Court of Appeals held that this factual finding was not clearly erroneous (927 F.2d at 542-543) and, as a result, held that the employer had not breached its fiduciary duties under ERISA. 927 F.2d at 544. The *Barnes* Court noted that its decision was consistent with *Berlin v. Michigan Bell Telephone Co.*, 858 F.2d 1154 (6th Cir. 1988), because under *Berlin*, liability could only be imposed for material misrepresentations. 927 F.2d at 544. Because there were no misrepresentations, there could be no liability. *Id.* In *Berlin* and *Drennan*, the Plaintiffs produced evidence of mispresentations and, therefore, the Sixth Circuit, consistent

with *Barnes*, held that liability could be imposed for breach of fiduciary duties.[9]

Plaintiffs did not request, nor did the District Court or the Court of Appeals impose, a duty of disclosure. Numerous courts, like the Court herein, have held that misleading communications to a plan's participants constitute a breach of fiduciary duties. *See, e.g., Local Union 2134, United Mine Workers of America v. Powhatten Fuel, Inc.*, 828 F.2d 710, 713 (11th Cir. 1987); *Meunchow v. Parker Pen Co.*, 615 F.Supp. 1405, 1417 (W.D. Wis. 1985). As stated in *Peoria Union Stock Yards Co. v. Penn Mutual Life Insurance Co.*, 698 F.2d 320, 326 (7th Cir. 1983), "[l]ying is inconsistent with the duty of loyalty owed by all fiduciaries and codified in [29 U.S.C. §1104]." *See also, Eddy v. Colonial Life Insurance Co. of North America*, 919 F.2d 747, 750 (D.C. Cir. 1990).

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[9] GM also cites *Stanton v. Gulf Oil Corp.*, 792 F.2d 432 (4th Cir. 1986). In *Stanton*, the Court held that there was no duty to disclose information on potential plan amendments. The *Stanton* Court, however, recognized the claims of misrepresentation were not supported by the evidence, implying that such misrepresentations, if proven, would violate ERISA. *Id.*, at 435. The other cases relied upon by GM also deal only with a failure to disclose information. *See, Young v. Standard Oil (Indiana)*, 848 F.2d 1039, 1045 (7th Cir. 1988), *cert. denied*, 488 U.S. 481, 109 S.Ct. 529 (1988); *Porto v. Armco, Inc.*, 825 F.2d 1274 (8th Cir. 1987), *cert. denied*, 485 U.S. 937, 108 S.Ct. 1114 (1988); *Trexel v. E.I. du Pont de Nemours & Company*, 845 F.2d 1016 (3d Cir. 1988); and *Sleichter v. Monsanto Company*, 612 F.Supp. 856 (E.D. Mo. 1985). (The Court specifically noted there was no evidence of misrepresentations. 612 F.Supp. at 859). Thus, these cases, like *Payonk*, do not justify GM's conduct in the case at bar.

CONCLUSION

Based upon the foregoing legal authority and arguments, it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

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